Supreme Court, U.S.
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Supreme Court of the United States

ISAAC SIMEON ACHOBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant who is retried for an offense may appeal, after final judgment, the erroneous denial of his motion for a judgment of acquittal at the first trial.

PARTIES TO THE PROCEEDINGS BELOW

Otukayode Adeleke Otufale, Chicha Kazembe Combs, André Dion Brown, John David Wiley, III, and Anthony Dwayne Essett were defendants in the district court and appellants in the court of appeals. Their appeals were severed from Mr. Achobe's appeal while the case was pending in the Fifth Circuit. The remaining parties are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Isaac Simeon Achobe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals affirming Mr. Achobe's convictions (App., *infra*, 1a-27a) and denying his petition for rehearing (App., *infra*, 38a-40a) are published at 560 F.3d 259 (5th Cir. 2008).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 18, 2008, and denied rehearing on February 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * ."

INTRODUCTION

In *Richardson* v. *United States*, 468 U.S. 317 (1984), this Court addressed whether a defendant could seek interlocutory review following a mistrial to prevent his retrial on the ground that it would violate double jeopardy. The defendant there claimed that the evidence at his first trial was insufficient—contrary to the district court's denial of his motion for judgment of acquittal—and argued that his retrial would violate double jeopardy as a result. This Court rejected that challenge, holding that, regardless of whether the district court erred in denying the motion for acquittal, double jeopardy did not bar retrial.

Richardson did not address whether the district court's ruling on the motion for acquittal could be reviewed following final judgment after retrial. The courts of appeals have now divided over that question. The Ninth Circuit has held that *Richardson* does not preclude post-judgment review of a district court's denial of a motion for acquittal at an earlier trial. The Eleventh Circuit has agreed in dicta. And the government itself took the position that review is available in its briefs in *Richardson*. In the decision below, by contrast, the Fifth Circuit expressly rejected the Ninth Circuit's position, joining three other circuits in holding that *Richardson* bars review of such claims. This Court should grant the petition to resolve that express circuit conflict on a recurring and important issue.

STATEMENT

I. BACKGROUND

Petitioner Isaac Simeon Achobe has been a licensed pharmacist since 1983. App., *infra*, 2a n.1. For many years, he operated a pharmacy in Houston, Texas. *Id.* at 2a. Many of the doctors for whom he filled prescriptions were pain-management specialists. *Id.* at 3a. Accordingly, he often dispensed pain medications such as hydrocodone (a painkiller sold under brand names such as Vicodin). See *id.* at 2a, 32a. Because pain medications are susceptible to diversion and abuse, pain-management practices are a recurring source of controversy between the DEA and healthcare professionals. See Noah, *Challenges in the Federal Regulation of Pain Management Technologies*, 31 J.L. Med. & Ethics 55 (2003).

Dr. Callie Herpin operated a pain-management clinic in Houston. App., *infra*, 2a. Although she initially wrote valid prescriptions, her practice evolved into a "script mill" that sold prescriptions to people with no medical need. See *ibid.* Eventually she began selling prescriptions in bulk: Drug dealers would purchase "lists" of 25, 50, or more names that her staff had picked at random out of the phone book, together with corresponding prescriptions. See *id.* at 3a; 4/19 Tr. 105-117. The dealers would then take those lists and prescriptions and present them to pharmacies to fill. See *ibid.*

II. PROCEEDINGS IN DISTRICT COURT

A. The Indictment

After a DEA investigation uncovered Dr. Herpin's operation, the government indicted Dr. Herpin and her staff. App., *infra*, 3a; C.A. R. 57-115. It also charged six pharmacists, including Mr. Achobe, who had filled her prescriptions. See *ibid.* Dr. Herpin pled guilty and cooperated with the prosecution. App., *infra*, 3a.

The government charged the pharmacists with violating the Controlled Substances Act. C.A. R. 85-90. That Act prohibits any person from "knowingly or intentionally * * * distribut[ing] or dispens[ing] * * * a controlled substance" without authorization. 21 U.S.C. § 841(a)(1). Pharmacists are authorized to distribute controlled substances pursuant to a prescription. *Id.* § 829. But regulations state that "[a]n order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [the Act]" and that "[a] person *knowingly* filling such a purported prescription * * * shall be subject to the [Act's] penalties." 21 C.F.R. § 1306.04(a) (emphasis added). The government contended that the pharmacists had violated the Act by filling Dr. Herpin's prescriptions despite knowing that they were not written for a legitimate medical purpose. See C.A. R. 85-90.[1]

B. The Evidence at the First Trial

The principal issue at trial, therefore, was whether the pharmacists *knew* that Dr. Herpin had written prescriptions for people with no medical need. With respect to the other five pharmacists—but not Mr. Achobe—the government relied on evidence that the defendants had filled prescriptions from Dr. Herpin's "lists." The government argued (with some force) that pharmacists who filled prescriptions for customers who handed them lists with dozens of names of unknown individuals and corresponding prescriptions could not possibly have thought the prescriptions were legitimate. See, *e.g.*, 5/11 Tr. 16. There was substantial evidence that those other five pharmacists had filled prescriptions from Dr. Herpin's

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[1] The government also alleged conspiracy in violation of 21 U.S.C. § 846 and money laundering in violation of 18 U.S.C. § 1956. C.A. R. 71-85, 90-97. Those counts likewise required proof that the pharmacists knew Dr. Herpin's prescriptions were illegitimate. See *ibid.*

lists. Names in the pharmacists' dispensing records matched lists seized from Dr. Herpin's office, often in the same sequential order. See 4/28 Tr. 1652-1659, 1665-1666. Those pharmacies filled massive quantities of Herpin prescriptions—in one instance, 604 in a single day. See Gov't Ex. 93. And the dates were suspicious as well. On May 4, 2003, for example, one pharmacy filled 51 Herpin prescriptions, all dated either February 12 or March 4. 5/11 Tr. 16. As the government pointed out, it was very unlikely that 51 patients would all obtain prescriptions on two particular dates, do nothing for several months (despite having been in enough pain to see a specialist), and then show up at one pharmacy on a single day to have the prescriptions filled. See *ibid.*

By contrast, as the government repeatedly conceded, there was "no evidence" that Mr. Achobe filled prescriptions from Dr. Herpin's lists. App., *infra*, 31a. Mr. Achobe did fill Herpin prescriptions for some *individual* customers—on average, one or two a day over the course of a year. *Id.* at 5a; Gov't Ex. 75. But he did "not fill prescriptions from lists." App., *infra*, 5a.

The government's evidence against Mr. Achobe was thus attenuated at best. Dr. Herpin testified that she discussed pain management as a career option with Mr. Achobe before opening her practice. App., *infra*, 2a-3a. But she said she perceived nothing "odd" about the conversation and "c[ould]n't remember" who brought up the topic. 4/19 Tr. 47-48. She testified that Mr. Achobe warned her not to "write prescriptions for people that didn't exist," "do lists," or write "large quantities." App., *infra*, 7a. She claimed she "assumed" there was an illegal element underlying his advice, but also said she was "surprised" he was being prosecuted because he "[n]ever suggest[ed] [that she] break any laws" and was merely "trying to help a young doctor get started in the business." *Id.* at 6a-7a. "[I]f [she] had followed [his] advice," she

admitted, she "would not be guilty." *Id.* at 7a. Dr. Herpin also noted that, after she began practicing, Mr. Achobe "questioned [her] about the quantities of her prescriptions" and ultimately "refused to fill any more." *Id.* at 6a.

An undercover officer testified that she had gone to Mr. Achobe's pharmacy twice (once with a partner) to fill prescriptions from Dr. Herpin. See 4/22 Tr. 795-800. Mr. Achobe could not dispense one of the medications—promethazine with codeine, an analgesic cough syrup—because he was out. *Ibid.* Although the officer claimed that she and her partner never received that cough syrup, Mr. Achobe's records appeared to indicate that the prescriptions were later filled, a discrepancy the government deemed incriminating. *Id.* at 800; 4/20 Tr. 422-425.

Finally, the government called as an expert a pharmacist who worked at a grocery store. 4/27 Tr. 1404. Showing him several Herpin prescriptions Mr. Achobe had filled, it asked whether a responsible pharmacist would have filled them. 4/26 Tr. 1173-1196. The expert opined that such a pharmacist "might" fill the first, "might" fill a second, but would not fill any more because "a flag should be raised at this point" due to the nature and quantities of the medications. *Id.* at 1192-1196.

By contrast, two other experts—including a former State Board of Pharmacy officer with almost five decades of experience—testified that the medications Mr. Achobe dispensed were legitimate pain treatments and that the amounts he dispensed were reasonable. 5/5 Tr. 2025-2044; 5/9 Tr. 2511-2521; Gov't Ex. 75. Other evidence confirmed Mr. Achobe's good faith. Documents showed that he had "called doctors to confirm many prescriptions" and had "cancelled prescriptions and notified doctors when their patients were seeking prescriptions from multiple providers for the same medical problems." App., *infra*, 6a. He had refused to fill prescriptions for one doctor who did not provide adequate documentation.

Ibid. When the undercover officer tried to convince Mr. Achobe to fill a prescription early, he "refused to bend the rules." *Id.* at 5a. Mr. Achobe "had even aided previous federal and state narcotics investigations—DEA once set up a controlled delivery and arrest in his pharmacy." *Id.* at 6a.[2]

Mr. Achobe admitted to the initial conversation with Dr. Herpin, but explained that he had stressed to her the importance of examining every patient and keeping paperwork up to date because pain specialists were subject to "very high scrutiny" by the DEA. 5/5 Tr. 2230-2236. Mr. Achobe also explained the discrepancy in his records regarding the two undercover officers' bottles of cough syrup, testifying that he had entered the dispensing information in his computer because the officers said they were coming back. *Id.* at 2265-2268; 5/6 Tr. 2332-2335.

C. The Motions for Acquittal and Mistrial

At the close of the government's case, petitioner moved for a judgment of acquittal, claiming that the evidence against him was insufficient. App., *infra*, 28a. The government conceded there was "no evidence" that Mr. Achobe filled from lists, *id.* at 31a, and admitted that, while the other pharmacists had dispensed "large quantities," Mr. Achobe "d[id]n't have the numbers," *id.* at 32a. But it claimed the evidence was sufficient nonetheless. *Id.* at 29a-32a.

The government pointed to "Dr. Herpin's testimony that they had the initial conversation where he brought up the issue of pain management, where he gave her advice as to how she should conduct herself." App., *infra*, 29a-30a. It pointed to the "two days where the prometh-

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[2] The government attempted to impeach Mr. Achobe by pointing out that his records contained some errors, 5/6 Tr. 2411-2413, and that several customers had given him written authorizations allowing one individual to pick up their refills, *id.* at 2420-2423.

azine with codeine * * * was on the prescriptions for the undercovers who went to Mr. Achobe," but his "dispensing records indicate that in fact he dispensed those pints * * * to whoever, we don't know." *Id.* at 31a-32a. And it pointed out that Mr. Achobe was "ordering more hydrocodone than the Texas average"—31,366 tablets versus the state average of 27,323. *Id.* at 32a; 4/21 Tr. 458.

The court denied petitioner's motion without explanation, App., *infra*, 33a, and denied his renewed motion at the close of all evidence, *id.* at 34a-37a. The jury deliberated for four days but was unable to reach a verdict. *Id.* at 3a; 5/17 Tr. 2822, 2827-2828. The court declared a mistrial. App., *infra*, 3a. Counsel's post-trial interviews revealed that the jury had deadlocked 8 to 4 in favor of acquitting Mr. Achobe. See 2/28/06 Tr. 3.

D. The Second Trial

The government then retried the case. App., *infra*, 4a. In some respects, the evidence at the second trial was similar. For example, the government presented the same testimony about the two undercover officers' missing bottles of cough syrup, 8/30 Tr. 142-157, and both sides again presented expert testimony from pharmacists, see 9/7 Tr. 50-98; 9/19 Tr. 187-230.

In other respects, however, the evidence was very different. Most notably, the government announced shortly before trial that it had "had an opportunity to spend more time with Dr. Herpin" and that she was going to "elaborate" on her prior testimony. 8/15 Tr. 8-9. And "elaborate" she did. "At the first trial she was uncertain over who brought up pain management during her first conversation with Achobe, but at the second trial she expressed certainty that it was Achobe." App., *infra*, 8a. While her earlier account of the conversation was largely innocuous, she now testified that Mr. Achobe told her that pain specialists prescribed promethazine with co-

deine because "'[i]t made people high * * * and they put it in soda.'" *Ibid.* "She said that Achobe had told her not to allow payment by insurance, although she had first testified that [someone else] gave her this advice." *Ibid.* "She also testified, as she had not done in the first trial, that some of her early patients said they were sent by Achobe." *Ibid.* Finally, "she recounted a phone conversation, not reported her first time on the stand," in which Mr. Achobe called her a "'rogue doctor'" but then "continued to fill her prescriptions for several months" before finally refusing to fill any more. *Id.* at 8a-9a.

The government also presented new testimony from two cooperating drug dealers who had filled prescriptions at Mr. Achobe's pharmacy. Those witnesses did not claim they had done or said anything explicit to indicate that they had obtained the prescriptions unlawfully. But they testified that they sometimes had one to three companions with them, each with his own individual Herpin prescription. 8/25 Tr. 248-260; 9/12 Tr. 245-264; 9/13 Tr. 5-23. And the companions sometimes signed authorizations allowing the dealers to pick up refills for them. 8/25 Tr. 260-264; 9/12 Tr. 250-252; 9/13 Tr. 6, 23-30.

The government also called an additional expert—a pain specialist with a lengthy resume. 9/12 Tr. 14-37. He testified that one of the medications Mr. Achobe dispensed was not normally prescribed for pain, although he admitted that one article in a medical journal advocated that use. See *id.* at 48-53, 85; 9/16 Tr. 118-122.

The jury found Mr. Achobe guilty on all counts. App., *infra*, 4a. Mr. Achobe again moved for a judgment of acquittal, C.A. R. 3559, which the court denied, *id.* at 4829. The court imposed a sentence of 63 months' imprisonment and monetary penalties. App., *infra*, 4a.

III. THE COURT OF APPEALS' DECISION

Petitioner appealed, arguing (among other things) that the evidence was insufficient to prove beyond a reasonable doubt that he knew Dr. Herpin's prescriptions were illegitimate. See App., *infra*, 5a-14a. Recognizing that the government had significantly strengthened its case on retrial, he did not limit his challenge to the sufficiency of the evidence at the second trial. He also separately challenged the sufficiency of the evidence at the first trial. See *id.* at 9a. Consistent with then-existing Fifth Circuit precedent, he urged that the district court's erroneous denial of his motion for acquittal at the first trial, while not appealable on an interlocutory basis, was reviewable following the entry of final judgment after retrial and independently required reversal. See Def. C.A. Br. 30 (citing *United States* v. *Wilkinson*, 601 F.2d 791, 794 (5th Cir. 1979); *United States* v. *Rey*, 641 F.2d 222, 225-226 & n.8 (5th Cir. 1981); and *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980)).

The government did not defend on the merits the district court's ruling that the evidence at the first trial was sufficient. Instead, it argued that the ruling was unreviewable and that petitioner could challenge only the sufficiency of the evidence at his second trial. See Gov't C.A. Br. 32-51 & n.25.

The Fifth Circuit agreed with the government. It held that the evidence at the second trial was sufficient, relying largely on Dr. Herpin's testimony. See App., *infra*, 5a-9a. And it refused to address whether the district court had erred in denying the motion for acquittal at the first trial, holding that that ruling was unreviewable. See *id.* at 9a-14a.

In reaching that conclusion, the court of appeals stated that its analysis was "guide[d]" by this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984). App.,

infra, 9a. In *Richardson*, the defendant sought interlocutory review of the district court's denial of his motion to acquit after his first trial ended in a mistrial, claiming that a retrial would violate double jeopardy. 468 U.S. at 318-319. This Court rejected the challenge, concluding that, whether or not the ruling on the motion to acquit was correct, double jeopardy did not bar the retrial. *Id.* at 322-326.

The Fifth Circuit acknowledged that there was a "key difference" between *Richardson* and this case. App., *infra*, 11a. "*Richardson* arose on an interlocutory appeal before the second trial commenced." *Ibid.* By contrast, "[r]ather than seeking to prevent re-trial by interposing his double jeopardy claims, [petitioner] looks to renew his challenge to the district court's ruling on a motion that has only now become appealable, since judgment is final." *Ibid.* The court admitted that "*Richardson* might not foreclose an appeal of the denial of a motion for directed verdict for insufficiency of the evidence at the *first* trial when the *second* trial has concluded and the defendant has an appealable final judgment in hand." *Ibid.* The court also conceded that its pre-*Richardson* precedent permitted such challenges "in a situation directly analogous to the instant case." *Ibid.* (citing *Wilkinson*, 601 F.2d 791).

Nonetheless, the court of appeals held that its precedents were no longer good law because their "reasoning conflicts with *Richardson*." App., *infra*, 12a. "Where a conviction is actually overturned for [in]sufficiency," the court explained, "there can be no second trial." *Ibid.* "But where the conviction is not finally attained, for instance with a hung jury, * * * there is no jeopardy bar, because in such cases, as *Richardson* teaches, jeopardy never ceased." *Ibid.* The First, Third, and Tenth Circuits, the court noted, had also held that *Richardson* bars review in "identical" or "directly analogous" circumstanc-

es. *Id.* at 12a-13a (citing *United States* v. *Coleman*, 862 F.2d 455 (3d Cir. 1988); *United States* v. *Willis*, 102 F.3d 1078 (10th Cir. 1996); and *United States* v. *Julien*, 318 F.3d 316 (1st Cir. 2003)).

The Fifth Circuit acknowledged that the Ninth Circuit had reached the opposite result in *United States* v. *Recio*, 371 F.3d 1093 (9th Cir. 2004), which also arose in a posture "analogous to the instant case." App., *infra*, 13a-14a & n.25. The Ninth Circuit "distinguished between the situation in *Richardson*, in which an interlocutory appeal *on Double Jeopardy Clause grounds* was the basis for the challenge," and cases where a defendant seeks review of the earlier sufficiency-of-the-evidence ruling "after a final judgment ha[s] been rendered." *Id.* at 14a (emphasis added). Interpreting *Richardson* more "narrowly," the Ninth Circuit "decided that it could review the first-trial sufficiency." *Ibid.*

The Fifth Circuit expressly rejected the Ninth Circuit's approach: "We decline to follow the *Recio* court." App., *infra*, 14a. Instead, following the other circuits, the court of appeals held that, "where a first trial has ended in a mistrial due to a hung jury and a second trial leads to a conviction, the sufficiency of the evidence presented at the first trial cannot then be challenged on appeal." *Ibid.* The court accordingly affirmed petitioner's convictions, *id.* at 27a, and later denied rehearing, *id.* at 38a-40a.[3]

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[3] The court reversed two of petitioner's six money-laundering convictions after the government conceded, for unrelated reasons, that the evidence was insufficient to support them. See App., *infra*, 16a-17a. The court vacated the sentences relating to those counts and remanded for resentencing. *Id.* at 27a. The court rejected petitioner's other grounds for appeal, which are not relevant here. See *id.* at 15a-27a.

REASONS FOR GRANTING THE PETITION

This case concerns an express conflict among the courts of appeals over whether a defendant who is retried for an offense may appeal, after final judgment, the erroneous denial of his motion to acquit at the first trial. The Ninth Circuit has expressly held, and the Eleventh Circuit has stated in dicta, that defendants may pursue such claims. The United States has previously endorsed that position as well. By contrast, in the decision below, the Fifth Circuit "decline[d] to follow" the Ninth Circuit's approach and joined three other circuits in holding that such rulings are completely unreviewable. App., *infra*, 12a-14a. Like those other circuits, the Fifth Circuit believed that this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984), forecloses review. The courts of appeals are thus squarely divided.

The issue, moreover, is recurring and important. It has regularly arisen in the past and has the potential to arise in myriad contexts in hundreds of cases each year. The issue is also of substantial importance to defendants—who, under the decision below, lose *any* opportunity for review of their claims. Finally, this case is an ideal vehicle. The government's substantially weaker case at the first trial underscores the importance of preserving a defendant's traditional right to challenge all prejudicial interlocutory rulings on appeal once the trial court enters final judgment.

I. THE COURTS OF APPEALS ARE DIVIDED

In *Richardson*, this Court addressed whether a defendant can seek interlocutory review following a mistrial to prevent his retrial on the ground that it would violate double jeopardy. The district court in that case had denied the defendant's motion for acquittal at his first trial and then declared a mistrial after the jury deadlocked. 468 U.S. at 318-319. When the government sought to re-

try the defendant, he appealed, claiming that his retrial would violate double jeopardy. *Id.* at 319-320. He invoked *Abney* v. *United States*, 431 U.S. 651 (1977), which allows interlocutory appeals under the collateral-order doctrine to prevent double-jeopardy violations. 468 U.S. at 320. This Court concluded that the court of appeals had jurisdiction over the double-jeopardy claim under *Abney*. 468 U.S. at 321-322. But the Court rejected the claim on the merits. *Id.* at 322-326. Because there had been no judgment of acquittal or other event terminating jeopardy at the first trial, the Court explained, retrying the defendant would not subject him to "double" jeopardy, whether or not the trial court's ruling on the motion for acquittal was correct. See *id.* at 325-326.

Richardson makes clear that a retrial following the erroneous denial of a motion to acquit does not violate double jeopardy. But the Court did not address whether a defendant can seek review of the sufficiency ruling in its own right on appeal from the final judgment following retrial. In the wake of *Richardson*, courts have divided over that issue. Some permit such claims, reasoning that *Richardson*'s double-jeopardy holding does not preclude review of a sufficiency ruling following final judgment. Others, like the court below, read *Richardson* more broadly to preclude such review.

A. The Ninth and Eleventh Circuits Permit Post-Judgment Review of a Sufficiency Ruling at an Earlier Trial

1. In *United States* v. *Recio*, 371 F.3d 1093 (9th Cir. 2004), the Ninth Circuit held that *Richardson* does *not* bar post-judgment review of a sufficiency ruling at an earlier trial. The district court there had denied the defendants' motion for acquittal at their first trial but then granted a new trial because of instructional error. *Id.* at 1096-1097. At the second trial, the government present-

ed new evidence, and the jury convicted. *Id.* at 1097. The Ninth Circuit reversed because of unrelated errors at the second trial. *Id.* at 1099-1103. The court then turned to whether the evidence was sufficient to support the convictions. *Id.* at 1103-1107. Absent sufficient evidence, the court would direct a judgment of acquittal, which would preclude another retrial. See *Burks* v. *United States*, 437 U.S. 1, 17-18 (1978).

Because the defendants claimed insufficiency at both their first and second trials, the Ninth Circuit first addressed whether the district court's denial of the motion to acquit at the first trial was reviewable. See 371 F.3d at 1103-1105. The court concluded that it was. The court noted that "we ordinarily allow appellants to challenge interlocutory orders on appeal from a final judgment." *Id.* at 1104. "'A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment.'" *Ibid.* Although the denial of the motion for acquittal at the first trial was an "interlocutory order [that] could not have been immediately appealed," that order had since "merged into a final judgment." *Ibid.* As a result, the defendants "should be allowed to appeal the evidentiary sufficiency ruling made after the first trial" in order to seek a judgment of acquittal that would bar another retrial. *Ibid.*

The court considered and rejected the argument that *Richardson* required a different result. 371 F.3d at 1104-1105. "*Richardson* held that a second trial following a hung-jury mistrial does not violate the Double Jeopardy Clause * * * ." *Id.* at 1104. But the Ninth Circuit explained that it was not "consider[ing] appellants' first-trial insufficiency argument in order to decide whether the second trial violated the Double Jeopardy Clause."

Ibid.[4] Rather, "appellants' first-trial insufficiency argument is now properly raised on appeal from a final judgment." *Id.* at 1104-1105. The court accordingly addressed the claim on the merits and found the government's evidence sufficient. *Id.* at 1105-1106.

2. The Eleventh Circuit reached the same result in *United States* v. *Gulledge*, 739 F.2d 582 (11th Cir. 1984). There, the district court denied the defendant's motion for acquittal at a trial that ended in a mistrial. *Id.* at 583-584. The defendant sought interlocutory review, challenging the sufficiency ruling and claiming that his retrial would violate double jeopardy. *Id.* at 584. The court of appeals rejected the double-jeopardy claim in light of *Richardson*. *Id.* at 584-585. But it made clear that the sufficiency ruling could be reviewed after final judgment: "[T]he purported insufficiency of the evidence in the first trial is reviewable by this court only on appeal from a conviction after a second trial * * * ." *Id.* at 584. Although that statement was dicta given the posture of the case, the conclusion is consistent with the Ninth Circuit's holding in *Recio*.

B. The United States Has Previously Agreed with the Ninth and Eleventh Circuits' Position

Like the Ninth and Eleventh Circuits, the government has previously taken the position that a sufficiency ruling at a prior trial is reviewable after final judgment following retrial. In its brief to the D.C. Circuit in *Richardson*, the government argued that prior-trial sufficiency rulings should not be immediately appealable *precisely because* post-judgment review was available. "Of course,"

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[4] In a footnote, the court likewise stated that it "need not decide whether [defendants] could also use their first-trial insufficiency argument to challenge their second trial *on double jeopardy grounds*." 371 F.3d at 1104 n.9 (emphasis added). Under *Richardson*, however, it is clear that such a claim would fail. See 468 U.S. at 322-326.

the government explained, "appellant's claim of insufficiency of the evidence at his first trial is not lost [i]f it is not reviewable at this time; in the event he is convicted, he can raise it on appeal from that conviction." U.S. Br. in No. 81-2029, at 14 n.3 (D.C. Cir. Apr. 14, 1982). The court of appeals noted that concession: "[T]he government concedes that Richardson's insufficiency claim will not be lost if it is not reviewed at this time, noting that 'in the event he is convicted, [Richardson] can raise [the insufficiency claim] on appeal from that conviction.'" *United States* v. *Richardson*, 702 F.2d 1079, 1081-1082 (D.C. Cir. 1983).

The government took the same position before this Court in opposing the petition for a writ of certiorari. Barring interlocutory review, the government stressed, would not deny a defendant "substantial and valuable relief," because he could obtain "reversal of any conviction obtained at the retrial on the ground that the evidence at the first trial was legally insufficient." U.S. Br. in Opp. in No. 82-2113, at 7 n.5 (Aug. 1983). The case presented only the "common, if lamentable, situation in which the accused must bear 'the discomfiture and cost of a prosecution' before his claim may properly be 'reconsider[ed] by an appellate tribunal.'" *Id.* at 11. In its brief on the merits, the government acknowledged that it had "conceded in the court of appeals and in [its] Brief in Opposition that any conviction obtained at the retrial could be reversed if the reviewing court found that the evidence at the first trial was legally insufficient"—although at that point it equivocated and noted that the Court did not need to resolve the issue. U.S. Br. in No. 82-2113, at 31-32 n.25 (Dec. 1983) (citation omitted).

C. The First, Third, Fifth, and Tenth Circuits Construe *Richardson* To Foreclose Review

1. In the decision below, by contrast, the Fifth Circuit reached the opposite result. The court recognized that *Recio*—a case it described as procedurally "analogous to the instant case"—held that a court of appeals "could review the first-trial sufficiency" following final judgment. App., *infra*, 13a-14a & n.25. But the Fifth Circuit "decline[d] to follow the *Recio* court," criticizing the Ninth Circuit for adopting what it considered an unduly "narrow[]" interpretation of *Richardson*. *Id.* at 14a.

Unlike the Ninth and Eleventh Circuits, the Fifth Circuit viewed *Richardson*'s double-jeopardy holding as precluding any review of the earlier sufficiency ruling. It invoked "the simple proposition that there must be a termination of the first jeopardy before there can be a second." App., *infra*, 9a. "[W]here [a] conviction is not finally attained, for instance with a hung jury, * * * there is no jeopardy bar, because in such cases, as *Richardson* teaches, jeopardy never ceased." *Id.* at 12a. This double-jeopardy principle, the court held, foreclosed review of not merely a double-jeopardy claim but also the sufficiency ruling itself: "[W]here a first trial has ended in a mistrial due to a hung jury and a second trial leads to a conviction, the sufficiency of the evidence presented at the first trial cannot then be challenged on appeal." *Id.* at 14a. The court did not explain why the reviewability of the sufficiency ruling after final judgment depended on whether the retrial violated double jeopardy.

2. Nonetheless, three other circuits have reached the same result. In *United States* v. *Coleman*, 862 F.2d 455 (3d Cir. 1988), the defendant was convicted on retrial after his first trial ended in a mistrial. *Id.* at 456. He then challenged the sufficiency of the evidence at his first trial on appeal from that final judgment. *Id.* at 460. The Third Circuit rejected the claim. Quoting *Richardson*, it

observed that "'a mistrial following a hung jury is not an event that terminates the original jeopardy'" and that, "'[r]egardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.'" *Ibid.* (quoting 468 U.S. at 326). From that principle, the court deduced that it was "limited to considering the sufficiency of the evidence at the second trial." *Ibid.*

The Tenth Circuit's decision in *United States* v. *Willis*, 102 F.3d 1078 (10th Cir. 1996), is to the same effect. The district court there similarly denied the defendant's motion to acquit at his first trial, which ended in a mistrial. *Id.* at 1080. The defendant sought review of that ruling following his conviction on retrial. *Ibid.* The court of appeals acknowledged that its pre-*Richardson* precedent permitted such claims, but opined that *Richardson*'s double-jeopardy holding "effectively overruled" that precedent. *Id.* at 1081. Under *Richardson*, the court held, a defendant cannot "resurrect his motion for acquittal at his first trial" on appeal from a final judgment following his retrial. *Ibid.*

The First Circuit agreed in *United States* v. *Julien*, 318 F.3d 316 (1st Cir. 2003). Citing *Willis* and *Coleman*, the court first held that *Richardson* bars any review on double-jeopardy grounds: "Because jeopardy does not terminate when the court declares a valid mistrial based on the inability of the jury to agree, defendant's claim of insufficiency of the evidence at the first trial presents 'no valid double jeopardy claim to prevent his retrial.'" *Id.* at 321 (quoting 468 U.S. at 326). The court then went on to "consider whether there is a due process or non-constitutional claim, separate from the double jeopardy claim, that [the defendant] is entitled to have the sufficiency of the evidence at the first trial determined at some point." *Ibid.* It explained:

> Under *Richardson*, a denial of a motion to dismiss for insufficiency of the evidence is an interlocutory order; it is not appealable after a mistrial and before a second trial except on double jeopardy grounds (grounds which the Supreme Court has rejected on the merits). The defense argument would be that there is a final appealable judgment after a conviction at the second trial, and [the defendant] may then appeal otherwise non-final rulings when he appeals from that judgment of guilt.

Ibid. The court asserted that, "[a]lthough *Richardson* does not expressly foreclose this point, there is language in both Justice Rehnquist's majority opinion and Justice Stevens' dissent which tends to demonstrate that the Supreme Court's majority would be inhospitable to such a claim." *Ibid.* (citing 468 U.S. at 326; *id.* at 334-335 (Stevens, J., dissenting)). The court thus held that a defendant could not claim, even after final judgment, that he was "wrongly denied his motion for acquittal on insufficiency of the evidence at the first trial." *Ibid.*

There is thus an express and well-defined circuit conflict over whether a defendant may seek review of the denial of his motion to acquit at an earlier trial following final judgment. The Ninth Circuit has held, and the Eleventh Circuit has indicated, that such review is available. Other circuits have read *Richardson* to preclude such review. The Fifth Circuit expressly recognized that conflict below, "declin[ing] to follow" the Ninth Circuit's decision. App., *infra*, 14a. And the fact that even the government has taken positions inconsistent with its current stance confirms the confusion over this issue and the pressing need for this Court's review.

II. THE DECISION BELOW IS ERRONEOUS

The decision below is also incorrect. Parties have long been entitled to seek review of interlocutory rulings after

final judgment. Nothing in *Richardson* abrogates that settled rule.

A. Parties Can Obtain Post-Judgment Review of Prejudicial Interlocutory Rulings

Because federal appellate courts' jurisdiction generally extends only to "final decisions," 28 U.S.C. § 1291, parties normally cannot seek immediate review of rulings that do not terminate the litigation. See *Cunningham* v. *Hamilton County*, 527 U.S. 198, 203-204 (1999). The purpose of that final-judgment rule is not to preclude review of interlocutory rulings altogether. Rather, "[t]he purpose is to combine in one review all stages of the proceeding." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The rule simply requires parties to "raise all claims of error in a single appeal." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981).

For that reason, a corollary of the final-judgment rule is that parties normally *can* seek review of prejudicial interlocutory rulings following final judgment. "The prohibition against immediate appeal * * * is offset by the rule that once appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed." 15A C. Wright *et al.*, *Federal Practice and Procedure* § 3905.1, at 249 (2d ed. 1991) (footnote omitted). The "appeal from final judgment opens the record and permits review of all rulings that led up to the judgment." *Id.* at 250-252 & n.3 (collecting cases).[5] Consis-

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[5] See also, *e.g.*, *City of New York* v. *Smokes-Spirits.Com, Inc.*, 541 F.3d 425, 453 (2d Cir. 2008) (appeal from final judgment "'incorporates all previous interlocutory judgments in th[e] case and permits their review'"); *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 682 (7th Cir. 1990) (appeal from final judgment "brings up all previous rulings of the district judge adverse to the appellant"); 19 *Moore's Federal Practice* § 205.08[2] (3d ed. 2009) ("An appeal from a final judgment brings up all prior interlocutory orders and rulings * * * .").

tent with that rule, this Court has repeatedly noted the availability of post-judgment review before disallowing immediate review of non-final orders. See, *e.g.*, *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375-376 (1987); *Flanagan* v. *United States*, 465 U.S. 259, 266-269 (1984); *United States* v. *MacDonald*, 435 U.S. 850, 860-861 (1978).[6]

As the Ninth Circuit explained in *Recio*, that rule applies squarely to prior-trial sufficiency rulings. Although an order denying a motion for acquittal is an "interlocutory order [that] c[an]not [be] immediately appealed," defendants "should be allowed to appeal the evidentiary sufficiency ruling made after the first trial" once that order has "merged into a final judgment." 371 F.3d at 1104. "'A necessary corollary to the final judgment rule is that a party may appeal interlocutory orders after entry of final judgment * * * .'" *Ibid.*

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[6] The "general rule" that an appeal from final judgment brings up all prior interlocutory rulings is subject to certain well-defined exceptions. See 15A Wright *et al.*, *supra*, § 3905.1, at 257. For example, a party to a civil case that has gone to trial generally cannot appeal an earlier denial of summary judgment. See *id.* at 257-260. That exception is justified on the ground that a summary-judgment ruling is merely a prediction of whether the evidence at trial will suffice, and "summary judgment procedure is not designed to confer a prize on the party who is correct as a matter of the pretrial record" when the prediction proves wrong. *Id.* at 258. Similarly, a criminal defendant cannot seek review of the mid-trial denial of his motion for acquittal made at the close of the government's case if he thereafter presents evidence in his defense. See *United States* v. *Calderon*, 348 U.S. 160, 164 n.1 (1954). That so-called "waiver rule" is founded on the principle that a defendant should not be allowed to present evidence on his behalf while "insulat[ing] himself from the risk that the evidence will be favorable to the government." *United States* v. *Rhodes*, 631 F.2d 43, 44 (5th Cir. 1980). Those deviations from the general principle are the proverbial exceptions that prove the rule. They rest on their own distinct logic and have no application here.

B. Nothing in *Richardson* Disturbs the Settled Rule That Parties Can Obtain Post-Judgment Review of Interlocutory Rulings

The four courts of appeals that have prohibited post-judgment review of prior-trial sufficiency rulings all concluded that *Richardson* foreclosed such claims. See pp. 18-20, *supra*. But *Richardson* did no such thing. *Richardson* addressed only whether a retrial following the erroneous denial of a motion to acquit would *violate double jeopardy*. The Court's ruling could not be clearer: Retrial would not violate double jeopardy because the mistrial did not terminate jeopardy. 468 U.S. at 325-326. The defendant in that case asserted *only* a double-jeopardy claim, because that was the only sort of claim that could be reviewed on an interlocutory basis under *Abney*. See *Richardson*, 468 U.S. at 320. The Court simply did not address—and had no reason to address—whether the erroneous denial of the motion to acquit could be reviewed in its own right following final judgment, just like any other interlocutory order.

The decision below, like most of the circuit cases on which it relies, simply conflates a challenge to a sufficiency ruling with a double-jeopardy claim. The court below began by declaring that "ultimately this issue [of reviewability] turns on the simple proposition that there must be a termination of the first jeopardy before there can be a second." App., *infra*, 9a. But that is not true. Whether a retrial *violates double jeopardy* turns on that proposition, but that does not resolve the reviewability of the sufficiency ruling. Petitioner did not claim below that his retrial violated double jeopardy; he specifically disavowed that argument. See C.A. Reply Br. 4 ("Mr. Achobe does not contend that his retrial violated double jeopardy. He contends only that the district court erred by denying his motion to acquit at the first trial."). The Fifth Circuit simply ignored the distinction between

those two types of claims. The Third and Tenth Circuits' analyses are flawed for the same reason. See *Willis*, 102 F.3d at 1080-1081; *Coleman*, 862 F.2d at 460.

The First Circuit at least recognized that *Richardson*'s double-jeopardy holding does not foreclose review under general final-judgment principles. See *Julien*, 318 F.3d at 321. But the court's reasons for denying review are inscrutable. The court asserted that "there is language in both Justice Rehnquist's majority opinion and Justice Stevens' dissent which tends to demonstrate that the Supreme Court's majority would be inhospitable to such a claim." *Ibid.* (citing 468 U.S. at 326; *id.* at 334-335 (Stevens, J., dissenting)). But nothing on the cited pages remotely addresses this issue.

The Ninth Circuit, by contrast, explained why *Richardson* has no bearing here. "*Richardson* held that a second trial following a hung-jury mistrial does not violate the Double Jeopardy Clause * * * ." *Recio*, 371 F.3d at 1104. But a court reviewing a first-trial sufficiency ruling after final judgment is not doing so "in order to decide whether the second trial violated the Double Jeopardy Clause." *Ibid.* Rather, the "first-trial insufficiency argument is * * * properly raised on appeal from a final judgment," just like any other prejudicial interlocutory ruling. *Id.* at 1104-1105. The court is simply determining the correctness of that ruling in its own right—just as it would with any other interlocutory order.[7]

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[7] That a retrial following the erroneous denial of a motion to acquit does not violate double jeopardy does not mean double-jeopardy principles are entirely irrelevant. For example, but for double-jeopardy principles, the government could argue that any error in denying the motion was harmless because, even if the court had granted it, the government could have retried the defendant and obtained the same result. See *United States* v. *Wilkinson*, 601 F.2d 791, 794 (5th Cir. 1979). Double-jeopardy principles foreclose that argument because, even after *Richardson*, it is clear that a district court's *grant*

III. THE ISSUE IS RECURRING AND IMPORTANT

A. The Issue Routinely Arises

1. Time and again, the federal courts have grappled with this issue. Since *Richardson*, six different courts of appeals have addressed whether a defendant can seek review of the denial of his prior-trial sufficiency motion following final judgment on retrial. See pp. 14-20, *supra*. Federal courts repeatedly addressed this issue before *Richardson* as well—and almost uniformly *allowed* post-judgment review.[8]

The issue has also repeatedly arisen in state courts. Some state courts allow post-judgment review of prior-trial sufficiency rulings.[9] Others reject such claims, often

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of a motion to acquit bars retrial. See 468 U.S. at 325 n.5; *Smith* v. *Massachusetts*, 543 U.S. 462, 466-467 (2005).

[8] See, *e.g.*, *Wilkinson*, 601 F.2d at 794 ("[T]he claimed insufficiency of the evidence in the first trial is before us on review of a judgment of conviction after a second trial."); *United States* v. *Bodey*, 607 F.2d 265, 267-268 (9th Cir. 1979) (defendant entitled to reversal "if the evidence at his first trial was insufficient"); *United States* v. *Balano*, 618 F.2d 624, 632 & n.13 (10th Cir. 1979) (first-trial sufficiency ruling "is now clearly appealable" post-judgment), overruled by *Willis*, 102 F.3d at 1081; *United States* v. *Rey*, 641 F.2d 222, 225-226 & n.8 (5th Cir. 1981) ("[T]he claimed insufficiency of the evidence at Rey's first trial is properly decided only on appeal after any conviction in his second trial."); *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980) ("[P]recisely this issue is subject to review on appeal from a second conviction, should one occur."); see also *United States* v. *Ellis*, 646 F.2d 132, 135-136 (4th Cir. 1981) (Murnaghan, J., concurring); *Richardson*, 702 F.2d at 1081 & n.17. Although the reasoning of some of these cases does not survive *Richardson*, the cases nonetheless show that the issue is recurring.

[9] See *State* v. *McGill*, No. 99CA25, 2000 WL 1803650, at *6-9 (Ohio Ct. App. Dec. 8, 2000); *State* v. *Seravalli*, 455 A.2d 852, 855-856 (Conn. 1983); *People* v. *Tingue*, 91 A.D.2d 166, 167-168 (N.Y. App. Div. 1983); *Rafferty* v. *Owens*, 82 A.D.2d 582, 586 (N.Y. App. Div. 1981). Again, while the reasoning in at least one of the earlier cases does not survive *Richardson*, the cases show the issue is recurring.

expressly relying on *Richardson*.[10] To the extent those courts have misinterpreted *Richardson*, they would benefit from this Court's guidance as well.

2. The issue will continue to recur. Whenever the government retries a defendant, the evidence on retrial is bound to differ somewhat from the evidence at the first trial. And because the prosecution will naturally seek to strengthen its case in the hope of obtaining a better outcome, those differences are likely to involve stronger evidence the second time around. See, *e.g.*, pp. 8-9, *supra*; *Recio*, 371 F.3d at 1097; *Coleman*, 862 F.2d at 460 n.9; *Alvey* v. *Commonwealth*, No. 2004-CA-000199-MR, 2005 WL 1490360, at *6 (Ky. Ct. App. June 24, 2005); *People* v. *Thompson*, 379 N.W.2d 49, 58 n.2 (Mich. 1985) (Brickley, J., dissenting in part). The issue can thus arise in *any* case where the government retries a defendant.

That is a substantial number of cases. Of the approximately 3,000 federal criminal trials each year, more than 130 are retrials following mistrials. See Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 257 tbl.D-7, 279 tbl.D-13 (2008). That number has increased sharply over the past five years. See *id.* at 279 tbl.D-13. And mistrial rates in state courts—which hear more than 50,000 criminal trials each year—are even higher. See P. Hannaford-Agor *et al.*, *Are Hung Juries a Problem?* 19-27 (Nat'l Ctr. for State Courts 2002).

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[10] See, *e.g.*, *People* v. *Doyle*, 765 N.E.2d 85, 91 (Ill. App. Ct. 2002); *State* v. *Hogan*, No. M1999-00013-CCA-R3-CD, 2000 WL 641149, at *3 (Tenn. Crim. App. May 19, 2000); *Romero* v. *State*, No. 09-95-143, 1996 WL 239832, at *2 (Tex. App. May 8, 1996); *Gallagher* v. *City of Van Buren*, 786 S.W.2d 837, 838 (Ark. Ct. App. 1990); *State* v. *Schelsky*, 481 N.E.2d 807, 809 (Ill. App. Ct. 1985); *Brandley* v. *State*, 691 S.W.2d 699, 701 (Tex. Crim. App. 1985); *People* v. *Thompson*, 379 N.W.2d 49, 56 (Mich. 1985).

The issue arises outside the mistrial context as well. It arises where a district court grants a defendant's motion for a new trial following a guilty verdict. See *Recio*, 371 F.3d at 1096-1097; *United States* v. *Rey*, 641 F.2d 222, 225-226 (5th Cir. 1981). It arises where a court of appeals reverses a conviction and remands for a new trial, but either the court neglects to address a sufficiency challenge or the grounds for the challenge do not yet exist (for example, because the insufficiency became apparent only after an intervening decision of this Court). Cf. *United States* v. *Miller*, 952 F.2d 866, 871 (5th Cir. 1992); *United States* v. *Porter*, 807 F.2d 21 (1st Cir. 1986); *United States* v. *Sneed*, 705 F.2d 745, 746-747 (5th Cir. 1983). And analogous issues arise in civil cases. See *Basciano* v. *Reinecke*, 313 F.2d 542 (2d Cir. 1963); *McFall* v. *Tooke*, 308 F.2d 617 (6th Cir. 1962). The vast number of cases in which this issue can and does arise weighs strongly in favor of granting the petition.

B. The Question Is Important to Criminal Defendants and the Administration of Justice

The reviewability of prior-trial sufficiency rulings is a matter of great importance to criminal defendants. *Richardson* involved the relatively modest question of *when* defendants could seek review, prohibiting only efforts to obtain immediate review by cloaking a sufficiency challenge in double-jeopardy garb. This case presents the much broader question of whether such rulings are reviewable *at all*. The consequences of the rule applied below and in three other circuits are harsh. Defendants are forever barred from obtaining review—however patently erroneous the district court's ruling may have been. Those circuits foreclose review even though, but for the district court's error, the prosecution would have ended altogether. See *Richardson*, 468 U.S. at 325 n.5. And they do so despite the normal rule that appeals from final judgments bring up all prior orders, see pp. 21-22, *su-*

pra—effectively singling out for disfavored treatment one category of interlocutory orders that are often particularly important to defendants.

Ironically, the decision below leaves defendants who are *not* convicted at their first trial worse off than those who are. If a jury convicts a defendant and the district court erroneously denies his motion to acquit, the court of appeals can correct the error on appeal. But if the jury is merely unable to reach a verdict and there is a retrial, the error is unreviewable. Moreover, even though the holding below does not result in actual double-jeopardy violations, it implicates similar fairness concerns because it gives the government multiple bites at the prosecutorial apple, affording it repeated opportunities to construct a legally sufficient case.

The question presented is also important to the criminal justice system. First-trial sufficiency challenges vindicate important interests of defendants, but they impose burdens—on defense counsel who may have to review an additional trial record to ascertain whether a basis for such a challenge exists, and on the government counsel and courts that must respond to and resolve such challenges. If *Richardson* does indeed bar such claims, courts and counsel in the Ninth and Eleventh Circuits would certainly benefit from knowing that. And in the half-dozen circuits that have not yet weighed in, courts and counsel can only speculate whether they have an obligation to undertake such review. This case thus implicates important interests whichever way the Court rules on the merits.

IV. This Case Is An Excellent Vehicle

Finally, this case is an excellent vehicle for resolving the question presented. The court below addressed the issue at length in a published opinion, expressly acknowledging that courts had reached conflicting results in

comparable circumstances. App., *infra*, 9a-14a. And petitioner assiduously preserved his claim at all stages below. See pp. 7-8, 10, *supra*.[11]

Moreover, the dramatic differences between the government's evidence at the two trials make this an ideal case in which to address the question. See pp. 8-9, *supra*. Although the court of appeals found the evidence at the second trial sufficient, see App., *infra*, 5a-9a, the differences in the evidence preclude any suggestion that that ruling dooms petitioner's first-trial challenge as well. The court of appeals did not address the sufficiency of the evidence at the first trial, and the government did not defend the district court's first-trial ruling on appeal, see Gov't C.A. Br. 37-38 n.25, foreclosing any argument on that point here, see *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1474 (2009). The case thus could not present the issue more squarely.[12]

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[11] Although the court of appeals reversed two of petitioners' six money-laundering convictions and remanded for adjustment of his sentence, see n.3, *supra*, this case is not interlocutory in any meaningful sense. Any proceedings on remand will not affect Mr. Achobe's *convictions*; the remand relates only to his *sentence*, which is not relevant to the question presented. See App., *infra*, 27a.

[12] If this Court were to grant the petition and reverse, whether the government preserved any response on the merits to the first-trial sufficiency challenge and the proper resolution of that challenge would be issues for the court of appeals to address on remand. Nonetheless, the government's grounds for opposing the motion for acquittal at the first trial are noteworthy for their insubstantiality. See pp. 7-8, *supra*. Mr. Achobe's initial advice to Dr. Herpin about not writing "large quantities" and the like, while not "incompatible with criminal intentions," App., *infra*, 7a, is equally consistent with the defense's position that Mr. Achobe was simply telling Dr. Herpin not to break the law. Evidence that gives "equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence" cannot support a conviction. *United States* v. *Pennington*, 20 F.3d 593, 597 (5th Cir. 1994). The two undercover officers' missing bottles

The substantial differences in the evidence also highlight the unfairness of the rule applied below. Having presented an utterly anemic case that caused the jury to hang 8 to 4 in favor of acquittal, the government got a second chance, allowing it to "spend more time" with its star witness so she could "elaborate" on her testimony, to recruit two drug dealers as witnesses, and to hire a new and more experienced expert. See pp. 8-9, *supra*. The government had that opportunity only because of the fortuity that the district court erroneously denied petitioner's motion to acquit at the first trial. The facts of this case thus make poignantly clear that denying review of such rulings—in the teeth of the settled rule that parties can generally appeal *all* interlocutory rulings after final judgment—would be the height of unfairness.

CONCLUSION

The petition for a writ of certiorari should be granted.

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of cough syrup, whether or not they would support a conviction for unlawfully distributing *those bottles* (a misdemeanor, see 21 U.S.C. § 841(b)(3); 21 C.F.R. § 1308.15(c)), hardly prove Mr. Achobe knew of Dr. Herpin's year-long scheme to sell prescriptions to people with no medical need. Finally, the government's claim that Mr. Achobe must be guilty because he dispensed 15% more hydrocodone than the state average (see p. 8, *supra*) barely warrants response. On that theory, nearly half the pharmacists in Texas would be guilty.

Respectfully submitted.

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MAY 2009

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-20229

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ISAAC SIMEON ACHOBE

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

December 18, 2008

Before KING, HIGGINBOTHAM, and WIENER, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Isaac Simeon Achobe was a pharmacist convicted with a number of others for their involvement in the illegal distribution of drugs. Achobe was convicted alongside five fellow pharmacists. His timely appeal was severed from his co-defendants. Their appeal has been decided this day by a different panel of this court, in *United States v. Brown*, No. 05-20997 [553 F.3d 768 (5th Cir. 2008)]. We rely on the factual recitation from that opinion, supplementing it with details relevant to Achobe.

I. BACKGROUND AND FACTS

The background of the conspiracy is this. On the suggestion of Achobe, Dr. Callie Herpin opened a pain management clinic in Houston, which soon evolved into a "script mill" that did little more than unlawfully sell prescriptions for controlled substances. Achobe and his co-defendants at trial were pharmacists who filled these prescriptions. For this case, the two most important drugs that Herpin wrote scripts for are promethazine with codeine, a Schedule V drug that treats coughs and nausea, and hydrocodone, a Schedule III pain killer. Both are known to have a high risk of abuse. Promethazine with codeine, often referred to as "purple" or "syrup," is a major street drug in the Houston area, and hydrocodone is a powerful, potentially addictive opioid narcotic, marketed under many names (Vicodin is one acetaminophen-hydrocodone blend), and sometimes, on the street, taken in combination with syrup and other drugs.

Drug dealers bought prescriptions from Herpin and at least three other doctors, sometimes in large quantities at a time. The dealers filled the prescriptions at pharmacies—usually independent pharmacies with whom they had long-term relationships, because most mainstream pharmacies will not fill prescriptions for these drugs, especially in often-repeated and large quantities. The dealers paid with large amounts of cash and then sold the drugs on the street.

The charged conspiracy period ran from around October 2002 to December 2003. The conspiracy had its origins in a 2002 conversation between Herpin and Achobe. Since 1997, Achobe had owned and run a Houston pharmacy called American Choice Home Healthcare Pharmacy.[1] Herpin, a doctor since 1998, was at the time work-

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[1] Achobe immigrated from Nigeria in 1978 and has been a licensed pharmacist since 1983.

ing part-time at a pediatrics clinic in the same building as American Choice. She told Achobe she was unhappy with her job, because it required long hours and offered too little pay. Achobe recommended that she enter the "pain management" business and referred her to some of his acquaintances who were "pain management specialists," Dr. Peters and Dr. Gbanaador. Achobe gave her advice about running a "pain management" practice and said that he could send "patients" to her (at least thirty to forty percent of Achobe's business involved filling prescriptions from "pain management" doctors). Herpin soon went from writing small numbers of prescriptions for individuals to selling scripts with information drawn from lists of fictitious patients with corresponding prescriptions. The government says that the co-conspirator pharmacists were in on the fix; they would accept large cash payments, and fill suspiciously large quantities of drugs and numbers of prescriptions for dealers who would in many cases come in repeatedly with scripts filled out in many different individuals' names. Achobe himself spurned some of the more egregious of these practices.

Herpin came to the attention of the DEA, eventually pleading guilty to conspiracy to distribute illegally narcotics and to Medicare fraud. Herpin was also writing illegal prescriptions for wheelchairs to further her Medicare fraud, but these defendants were not involved in that activity. Herpin, a pharmacist named Daryl Armstrong, a drug-dealer-turned-Herpin-employee Etta Williams, and other drug dealers, all testified for the government.

A grand jury returned a 121 count indictment against Achobe and others in September 2004. A 190 count superceding indictment issued in November 2004, and the case went to trial. The jury hung and the court declared a mistrial. The grand jury returned an 82 count second

superceding indictment after the mistrial. In addition to drug distribution and conspiracy counts, Achobe faced six counts of aiding and abetting money laundering promotion in violation of 18 U.S.C. § 1956(a)(1)(A)(i). In addition to Achobe and other pharmacists, the second superceding indictment charged three co-conspirators who either pled guilty or were convicted in separate trials.[2] Achobe and five pharmacist co-defendants went to trial again. The trial began on August 16, 2005, and the prosecution rested on September 15. Defense rested on September 27.

The trial centered on knowledge: did the pharmacists know they were filling illegitimate prescriptions? The prosecution's evidence was mostly circumstantial. There was testimony that the amounts of drugs being prescribed were unusual, as were the refill authorizations. The drug dealers who purchased the prescriptions would have multiple prescriptions filled at a time, and the prescriptions were often nearly identical. The same drug dealers were making numerous trips to the same pharmacies within short periods of time. And, everything was done in cash.

On October 4, 2005, Achobe and his co-defendants were convicted of all offenses with which they were charged. On February 28, 2008, the district court sentenced Achobe to 63 months of imprisonment and levied monetary penalties on him. He raises a number of grounds on appeal.

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[2] The other defendants included three drug dealers. Two pled guilty. The third went to trial, was convicted, and had his conviction affirmed by this court.

II. SUFFICIENCY OF ILLEGAL DISTRIBUTION EVIDENCE

A. Evidence at the Second Trial

Achobe challenges the sufficiency of the evidence supporting the jury verdict convicting him of illegal drug conspiracy and distribution.

The standard for a sufficiency claim is high. "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."[3] "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[4]

In making his sufficiency argument, Achobe seeks to draw a clear line between his co-defendants and himself. He acknowledges that the evidence against his co-defendants is sufficient, even overwhelming, and he seeks to contrast this with the evidence against him. Indeed, their overall quantity of hydrocodone purchases is huge compared to his. They filled many more Herpin prescriptions. Achobe notes that he filled "only a handful of Dr. Herpin's prescriptions—on average, about one or two a day over the course of a year." Government witnesses testified that Achobe would not fill prescriptions from lists and was known for "being law-abiding and doing things by the book and not breaking laws." Achobe points out that in the course of the undercover investigation of Herpin and her conspiracy, he refused to bend the rules for the undercover officer who urged him to refill a prescription early. In the officer's initial visit, she re-

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[3] United States v. Bryan, 896 F.2d 68, 74 [(5th Cir. 1990)] (*quoting* Glasser v. United States, 315 U.S. 60, 80 (1942)).

[4] Jackson v. Virginia, 443 U.S. 307, 319 (1979).

corded Achobe asking her the typical questions and giving the typical warnings of pharmacists before distributing medicines.

In fact, at the time of his first conversation with Herpin, Achobe was not doing business with one of the "pain management" doctors he pointed her to, because that doctor had not provided him with sufficient documentation for some prescriptions. Achobe presented documentation demonstrating that he called doctors to confirm many prescriptions, or even cancelled prescriptions and notified doctors when their patients were seeking prescriptions from multiple providers for the same medical problems. He had firm rules regarding when he would let individuals pick up prescriptions on the behalf of others.[5] He had even aided previous federal and state narcotics investigations—DEA once set up a controlled delivery and arrest in his pharmacy.

Furthermore, once Herpin's script mill was operating, Achobe questioned Herpin about the quantities of her prescriptions, at one point he told her to "tone it down," and ultimately he refused to fill any more of Herpin's prescriptions. In the first trial, Herpin confessed that she was "surprised" he had been criminally charged, because he "[n]ever suggest[ed] [that she] break any laws" and was merely "trying to help a young doctor get start-

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[5] Before allowing representatives to pick up prescriptions, Achobe required the named recipients of prescriptions to appear in person and sign an authorization allowing their agent to pick up prescriptions in their name. However, the policy was hardly airtight: one drug dealer who pled guilty and turned government witness, Omar Fahie, had authorization from sixteen individuals. Achobe's brief trumpets the testimony by Fahie and another witness, Sharon Boutte, that Achobe insisted on filling prescriptions for "real people." But scripts written for and picked up by "real people" can still be illegitimate, and filling them while knowing they are illegitimate remains illegal.

ed in the business"; she testified that "if [she] had followed [Achobe's] advice," she "would not be guilty." She admitted that Achobe did not know of more clearly illicit advice given to her by Dr. Peters, one of the doctors he had recommended that she speak to.[6] Nonetheless, she testified that she had "assumed" that there was an illegal element underlying his advice.

Achobe finds this last point "confusing[ ]." It need not be. Achobe's business practices were different from, and ultimately incompatible with, some of his co-conspirators. In Herpin's testimony, as throughout the record, there is evidence consistent with Achobe's being a law-abiding pharmacist—or with his being a careful criminal. It is reasonable for Herpin to have "assumed" that Achobe was suggesting that she join an illegal drug distribution conspiracy *but* carefully observe the superficialities of legal "pain management" practice in order not to get caught. He gave her such advice as: "[D]on't write prescriptions for people that didn't exist," "don't do lists," and don't write "large quantities." This litany of advice, while perhaps innocuous on its face, is hardly incompatible with criminal intentions. A legitimate pharmacist, giving advice to a legitimate doctor, need not tell her not to invent patients. These pieces of advice could be interpreted, together, as evidence of an illegal conspiracy; they are the equivalent of one schemer telling another, "make sure you only fill out false claim forms on behalf of real people; fill out the forms thoroughly; and don't make the claims unreasonably large."

In addition to testimony, there was much other evidence before the fact-finder, certainly enough to support the verdict. This evidence includes large cash payments and the dispensing of highly unusual quantities of drugs

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[6] The advice included: make sure patients are not wearing wires, accept only cash, and look out for marked bills.

extremely prone to abuse to drug dealers. The total scripts from Herpin alone that were filled by Achobe in the course of the charged conspiracy amount to over six hundred. In light of the testimonial and documentary evidence arrayed against Achobe, it strains credulity to argue that Achobe could have been unaware that he was filling prescriptions written for an illegitimate purpose.

Achobe claims that the jury in his first trial deadlocked 8-4 in favor of acquittal, and the government thereafter offered him a favorable plea, a misdemeanor with six months, a deal he refused, over the advice of counsel. He attributes the different result in his second trial to the fact that the government's prime witness, the ringleader of the conspiracy, Callie Herpin, "changed critical elements of her story." At the first trial she was uncertain over who brought up pain management during her first conversation with Achobe, but at the second trial she expressed certainty that it was Achobe. She also testified at the second trial that he had told her, when she expressed surprise that doctors would prescribe promethazine with codeine for pain (when it was usually prescribed for cold-like symptoms): "[I]t made people high and it made them, I guess, act—slow down or something and they put it in soda." She said that Achobe had told her not to allow payment by insurance, although she had first testified that another conspirator, Dr. Peters, gave her this advice. She also testified, as she had not done in the first trial, that some of her early patients said they were sent by Achobe. According to Achobe, the "[m]ost remarkable" change is that she recounted a phone conversation, not reported her first time on the stand, in which when Achobe called her about her quantities and she confirmed them, he refused to fill them, saying: "No. You are a rogue doctor. I will not do [it]," and hung up. After that alleged conversation, Achobe continued to fill

her prescriptions for several months. This last piece of evidence was, Achobe argues, highly prejudicial.

At trial, Achobe tested Herpin's credibility before the jury. Given the extent of Herpin's confessed criminality, of course, her credibility was already impaired. Despite Achobe's zealous testing of the evidence against him, the fact-finder found him guilty beyond a reasonable doubt, and we determine that there was sufficient evidence supporting Achobe's conviction.

B. Evidence at the First Trial

Achobe claims that the government put on a much weaker case during his first trial than it did during his second. Accordingly, he seeks to renew his motion for a directed verdict on the insufficiency of the evidence—from his *first* trial. He claims that the district court erred in not granting this motion when it was first made. He points out that he could not appeal this error at the time because the Supreme Court has forbidden interlocutory appeals on sufficiency, even after a case has gone to mistrial, and he argues this court should correct the district court's error on his appeal of the sufficiency of the evidence in his first trial. The argument is that the district court ought to have directed a verdict before the second trial. We turn to this complex issue, which is clearly settled in this circuit. The issue is whether at this stage—on appeal from a conviction secured in the trial following a mistrial—Achobe can challenge the sufficiency of the evidence at that first trial.

As we will explain, ultimately this issue turns on the simple proposition that there must be a termination of the first jeopardy before there can be a second. The Supreme Court's decision in *Richardson v. United States* guides our analysis.[7] In *Richardson*, the defendant

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[7] 468 U.S. 317 (1984).

moved to bar his retrial after one count of his first trial ended in a mistrial, on grounds that the retrial would violate his Fifth Amendment Double Jeopardy Clause rights. The Court rejected the contention, concluding that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. . . . [T]he failure of a jury to reach a verdict is not an event which terminates jeopardy."[8]

In *United States v. Miller*,[9] when their first convictions were reversed on appeal for defects in the indictment and jury instructions, defendants claimed a jeopardy bar of retrial, pointing to insufficiency of evidence. The panel considered itself bound by *Richardson*, despite the differences in posture: "We recognize that *Richardson* was an appeal asserting a double jeopardy claim which followed a mistrial [as opposed to an appellate reversal], but its holding is clearly not limited to such cases. It refuses to extend *Burks* [which *did* allow for application of the Double Jeopardy Clause to prevent retrial, when the appellate court reached and overturned a conviction on insufficiency grounds] beyond instances in which the appellate court *in fact* reversed for insufficient evidence. . . . The central concept of *Richardson* is that there is no *double* jeopardy unless the original jeopardy has *terminated* . . . ."[10] The panel's reasoning and conclusion about *Richardson* are compelling. "Following *Richardson*, we hold that double jeopardy does not bar this retrial, and because under *Richardson* jeopardy has

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[8] *Id.* at 325 (citations omitted).

[9] 952 F.2d 866 (5th Cir. 1992).

[10] *Id.* at 872. There is an outlying footnote in *Miller* noting that no further interlocutory appeals on double jeopardy claims could be heard by the circuit court, and thus these issues "will not be appealable before final judgment in this Circuit." *Id.* at 872 n. 5.

not terminated, double jeopardy will not be available as a ground for challenging any subsequent conviction that may result."[11]

Achobe counters that *Richardson* and *Miller* do not apply. The key difference between *Richardson* and his case is that *Richardson* arose on an interlocutory appeal before the second trial commenced. Rather than seeking to prevent re-trial by interposing his double jeopardy claims, he looks to renew his challenge to the district court's ruling on a motion that has only now become appealable, since judgment is final. He claims that it should be granted, and his conviction invalidated. He cites cases decided before *Richardson*,[12] most importantly *United States v. Wilkinson*.[13] *Wilkinson* held that in a situation directly analogous to the instant case, the defendants could challenge the sufficiency of their first-trial evidence, and that the evidence was sufficient. The panel cited *Abney v. United States*,[14] which allowed for interlocutory review of a district court's rejection of double jeopardy claims. The *Wilkinson* panel reasoned: "If the trial court had granted defendants' motions for acquittal on the conspiracy charge because the evidence was insufficient during their first trial, their retrial on that count would have been precluded."[15]

In theory, *Richardson* might not foreclose an appeal of the denial of a motion for directed verdict for insufficiency of the evidence at the *first* trial when the *second* trial has concluded and the defendant has an appealable final judgment in hand. While superficially appealing,

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[11] *Id.* at 874.

[12] *See, e.g.*, United States v. Rey, 641 F.2d 222 (5th Cir. 1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980).

[13] 601 F.2d 791 (5th Cir. 1979).

[14] 431 U.S. 651 (1977).

[15] *Wilkinson*, 601 F.2d at 794.

this reasoning conflicts with *Richardson*. As *Miller* noted, *Richardson* limits *Burke*'s application to its particular procedural posture. Where a conviction is actually overturned for sufficiency, there can be no second trial. But where the conviction is not finally attained, for instance with a hung jury, or where, as in *Miller*, it is overturned on grounds not implicating sufficiency,[16] there is no jeopardy bar, because in such cases, as *Richardson* teaches, jeopardy never ceased.[17]

The predominance of the case law from other circuits supports our application of *Richardson*. In *United States v. Willis*,[18] a case identical in procedural posture to the instant case, the Tenth Circuit held that *Richardson* led to the conclusion that after a conviction in a second trial, a sufficiency motion from the first trial could not be appealed. *Richardson* did not allow for examination of the sufficiency of the defendant's first trial because "'[r]egardless of the sufficiency of the evidence at [the defendant's] first trial, he has no valid double jeopardy claim to prevent his retrial.' . . . We therefore hold that defendant may not resurrect his motion for acquittal at his first

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[16] "[I]t is abundantly clear that a reversal for instructional error is no more a termination of jeopardy than a mistrial where the jury is unable to agree." *Miller*, 952 F.2d at 872. For this reason, *Miller* suggested: "Although not mandated by the double jeopardy clause, it is . . . clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction." *Id.* at 874.

[17] The *Richardson* Court acknowledged that under *Abney*, the interlocutory appeal was properly before it, but it declared that sufficiency arguments could no longer be raised interlocutorily as an attempt to evade a second trial following a mistrial, because they could not be successful. They were no longer colorable double jeopardy claims and thus no longer protected by *Abney*.

[18] 102 F.3d 1078 (10th Cir. 1996).

trial."[19] A First Circuit panel, in *United States v. Julien*,[20] applied *Richardson* to an appeal also directly analogous to Achobe's appeal in the instant case. The *Julien* court cited *Richardson* and declared that no double jeopardy argument was available. It went on to consider whether there is some other "due process or non-constitutional claim" that the sufficiency of the evidence from the first trial should be appealable after a conviction in a subsequent trial, but did not find one.[21] Finally, a Third Circuit panel relied on essentially the same reasoning in *United States v. Coleman*.[22] The panel noted: "A successful challenge to the first trial on a sufficiency basis would, of course, bar the subsequent trial on double jeopardy grounds."[23] The panel held that *Richardson* foreclosed this route; first-trial sufficiency of the evidence was not appealable.

Achobe points to *United States v. Recio*,[24] in which a divided panel of the Ninth Circuit reversed and remanded a procedurally complicated case for a new trial, the third in that case, after upholding the sufficiency of the

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[19] *Id.* at 1081 (alterations in original) (*quoting Richardson*, 468 U.S. at 326).

[20] 318 F.3d 316 (1st Cir. 2003).

[21] It articulated a possible argument: "[T]here is a final appealable judgment after a conviction at the second trial, and [the defendant] may then appeal otherwise non-final rulings when he appeals from the judgment of guilt." *Id.* at 321. The panel asserts that language in *Richardson* is "inhospitable" to such a claim, and that "inhospitality," it said, governs. It did not specify the language, but it cited the majority at 326 and Justice Stevens' dissent at 334-35.

[22] 862 F.2d 455 (3d Cir. 1988).

[23] *Id.* at 460.

[24] 371 F.3d 1093 (9th Cir. 2004).

evidence at the first trial.[25] The panel distinguished between the situation in *Richardson*, in which an interlocutory appeal on Double Jeopardy Clause grounds was the basis for the challenge, and the situation in which the challenge came after a final judgment had been rendered. Reading *Richardson* narrowly to address mainly jurisdictional or timing issues, the panel decided that it could review the first-trial sufficiency.[26] Even so, their interpretation of *Richardson* was not dispositive, as they found there was sufficient evidence and remanded for a new trial.

We decline to follow the *Recio* court. Supreme Court and Fifth Circuit precedent, as well as the precedent of other circuits, support the view that where a first trial has ended in a mistrial due to a hung jury and a second trial leads to a conviction, the sufficiency of the evidence presented at the first trial cannot then be challenged on appeal.

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[25] Because of the procedural posture, the issue was properly before that panel on a final judgment, and thus is analogous to the instant case.

[26] *Richardson* held that a second trial following a hung-jury mistrial does

> not violate the Double Jeopardy Clause if, at the time the second trial begins, no court has ruled the government's first-trial evidence insufficient. . . . *Richardson* also held that appellate courts may no longer exercise jurisdiction over interlocutory insufficiency appeals taken before a second trial has begun. . . . Neither of these holdings affects our review here, however, because we do not consider appellants' first-trial insufficiency argument in order to decide whether the second trial violated the Double Jeopardy Clause. We address an entirely different question: whether these defendants may be prosecuted at a *third* trial if the government presented insufficient evidence at the first.

Id. at 1104-05.

III. LIMITATION ON CROSS-EXAMINATION

Before the second trial in this case began, the government moved to "prevent defense counsel from soliciting testimony regarding whether the government investigated non-African American pharmacists in connection with the investigation of this case."[27] The court granted this in limine motion, and at trial, when defense counsel asked a government investigator whether there were "any pharmacists that [she] secured Callie Herpin's dispensing records from that were not owned by minorities," the court sustained an objection and told defense counsel to "stay away from this area."

Achobe claims that the prohibition of race-based questions violated his Sixth Amendment Confrontation Clause rights. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the [] issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[28]

The standard of review for this claim is harmless error,[29] and any error on this score is harmless, given the

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[27] At the first trial, defense counsel adduced evidence that there was a pharmacy run by a white pharmacist that was in the same building a[s] Achobe's pharmacy, that it filled ten times as many hydrocodone prescriptions as Achobe's pharmacy, and that the DEA agent who investigated Achobe did not investigate this other pharmacy. At the second trial, evidence emerged that this same pharmacy filled many prescriptions for Callie Herpin. Investigators offered race-neutral explanations: that the pharmacy "later closed down" and thus was no longer of interest; and the pharmacy was investigated, although no charges were brought, by another investigator. We need not look further into this issue.

[28] Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

[29] *Id.* at 684. Although the government does not straightforwardly claim this particular error was harmless, under these circumstances

amount of evidence produced by the prosecution.[30] The investigation was limited and straightforward, and the connection between Achobe and Herpin sufficiently compelling, given their early conversation, that the DEA's chosen focus of the investigation is reasonable. As to other defendants, there are also strong connections, and those pharmacies filled vast numbers of Herpin prescriptions. Achobe has failed to demonstrate a relevant bias, and we find no error.

We do not reach the question of whether Achobe properly objected to the evidentiary ruling, and whether Achobe sought simply to demonstrate witness bias or sought to make out a concededly incomplete selective prosecution claim.[31]

IV. MONEY LAUNDERING

A. Sufficiency of money laundering evidence

1. *Reversal of counts 20 and 25*

The government concedes that it did not present evidence sufficient to support two of the money laundering promotion counts for which Achobe was found guilty, counts 20 and 25. For one of them the government adduced evidence of only a misdemeanor, when the under-

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the court would choose, as it may, to apply harmless-error analysis. *See* Nelson v. Quarterman, 472 F.3d 287, 331-32 (5th Cir. 2006) (en banc) (Dennis, J., concurring in the judgment) (approving and elaborating on this doctrine); United States v. Vontsteen, 950 F.2d 1086, 1092-93 (5th Cir. 1992) (favorably citing other circuits' precedent on sua sponte harmless-error analysis).

[30] *See, e.g.*, United States v. Hitchmon, 609 F.2d 1098 (5th Cir. 1979) (remanding for new trial where strong evidence suggested expansive cross-examination restriction was severely prejudicial, as it crucially impaired the defense's testing of the credibility of witness testimony at the heart of the prosecution).

[31] *See* United States v. Abboud, 438 F.3d 554, 579-80 (6th Cir. 2006) (discussing this distinction).

lying crime must be a felony to trigger the money laundering statute. For the other crime, the government failed to introduce the evidence supporting the count altogether. These counts are therefore reversed.

2. ***Proceeds***

Achobe argues that the money used to promote further illegal activity did not involve the "proceeds" of specified unlawful activity as required under the money laundering statute as it was recently interpreted in the United States Supreme Court in *United States v. Santos*.[32] We resolve this issue in the decision issue[d] this day in the appeal of Achobe's co-defendants. There we explain that even if the more stringent definition of "proceeds" in the statute applies, the proof adduced by the government in this case against Achobe and against his co-defendants is sufficient.

3. ***Promotion***

Santos dealt primarily with the "proceeds" element of the money laundering promotion crime, but the "promotion" element requires attention as well. The issue is what type of activities the transactions must "promote" in order to support money laundering promotion charges.[33]

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[32] 128 S. Ct. 2020 (2008).

[33] In fact the *Santos* opinion casts doubt onto this circuit's "promotion" test. While the dissent seems to support this circuit's precedent on "operating expenses," the plurality expresses some hostility toward this line of reasoning: "The federal money-laundering statute, however, bars not the bare act of promotion, but engaging in certain transactions 'with the intent to promote *the carrying on* of specified unlawful activity.' . . . Surely one promotes 'the carrying on' of a gambling enterprise by merely assuring that it continues in business." *Id.* at 2027; *see also* United States v. Krasinski, 545 F.3d 546, 550-51 (7th Cir. 2008) (using *Santos* plurality to support a broad interpretation of "promotion"). We need not reach this issue.

This circuit has held that certain expenditures, even if tainted monies are used for them, will not suffice to support money laundering charges. We read the money laundering promotion statute to require "specific intent" to promote a specified unlawful activity with ill-gotten gains, and not simply to spend those ill-gotten gains. In *United States v. Brown*, the court warned:

> We have previously stressed the importance of not turning the money laundering statute into a money spending statute. . . . Strictly adhering to the specific intent requirement of the promotion element of § 1956(a)(1)(A)(i) helps ensure that the money laundering statute will punish conduct that is really distinct from the underlying specified unlawful activity and will not simply provide overzealous prosecutors with a means of imposing additional criminal liability any time a defendant makes benign expenditures with funds derived from unlawful acts.[34]

The "benign expenditures" in *Brown* were deposits "into the operating account of an otherwise legitimate business enterprise" (an automobile dealership), and the money was then used "for general business purposes."[35] In another case, the expenditures for payroll taxes, rent, and payroll supported a business that, in addition to its fraudulent activities, provided medical care to patients.[36] The court noted: "The crime of money laundering promotion is aimed not at maintaining the legitimate aspects of a business nor at proscribing all expenditures of ill-gotten

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[34] United States v. Brown, 186 F.3d 661, 670 (5th Cir. 1999) (internal quotations and citations omitted).

[35] *Id.* at 671.

[36] United States v. Miles, 360 F.3d 472, 478 (5th Cir. 2004); *cf.* United States v. Peterson, 244 F.3d 385 (5th Cir. 2001).

gains, but only at transactions which funnel ill-gotten gains directly back into the criminal venture."[37]

Achobe points out that the hydrocodone purchased in the charged transactions could be used for legitimate as well as illegitimate purchases. It is not contraband until it is sold—unlike, say, cocaine. He therefore argues that the charged payments are more analogous to those "maintaining the legitimate aspects of a business" than to those "funnel[ling] ill-gotten gains back directly into the criminal venture." Achobe seeks to benefit from the fact that what becomes contraband initially looks like it is not contraband; he stands convicted, of course, of abusing precisely the fact that these drugs have both legitimate and illegitimate uses. The government cannot and need not trace each individual pill or bottle. Achobe's unlawful activity required that he have hydrocodone on hand, and ordering from medical suppliers is the only known way for him to obtain hydrocodone. It is true that he may have purchased some hydrocodone that he legally distributed. But even on the assumption that he did so, he cannot frustrate the application of the money laundering statute by requiring prosecutors to prove that specific pills or bottles were illegal[ly] distributed. There is nothing to suggest that, as Achobe argues, his felonious conduct was [a] "'relatively minor' incident of an 'otherwise legitimate business enterprise.'"[38] Achobe notes that he filled a mere 173 Callie Herpin prescriptions for hydrocodone over the course of a year, and he believes that this amount should relieve him from liability, since it represents a relatively small proportion of his vast hydrocodone sales and distribution activity.[39] Further, in an-

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[37] *Miles*, 360 F.3d at 479.

[38] Brief for Appellant at 63 (quoting *Brown*, 186 F.3d at 671).

[39] He notes that the government has not provided "proof beyond a reasonable doubt" that he filled fraudulent hydrocodone scripts for

other fact he strains to turn in favor of his argument, he claims his pharmacy was a "legitimate business"; although he concedes that he did not keep any normal "other products for sale in the pharmacy, like over the counter medicines or anything else" in the "front area" of his store, he claims he did stock such supplies, although they were kept in the "back area."

Achobe's claims to legitimacy are not credible and are not analogous to the "otherwise legitimate business enterprise" cases. Ultimately, the nature of the materials involved make this decision straightforward. The government demonstrated that he intended to illicitly sell hydrocodone, and it need not prove that *all* hydrocodone was sold illicitly to demonstrate that he purchased hydrocodone to "promote" his activity.

B. Jury Instructions

Achobe also claims his version of the jury instructions should have been given. His proposed instructions include specific language on the "otherwise legitimate business enterprise" component of the money laundering promotion statute. But the instructions that the court approved, which closely track the model instructions on the issue and clearly lay out the contours of this crime, are not defective, and the decision not to provide further specific instructions is reviewed for abuse of discretion. Achobe has not pointed to any error that could meet this standard.

Claimed error in the jury instructions regarding the *Santos* "proceeds" issue has more traction but it also ultimately fails the test of plain error. *Santos* may have changed the definition of "proceeds," and the jury in-

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other doctors. This is true, in that such additional fraud was not charged, but the existence of other co-conspirators and related conspiracies are firmly supported by considerable evidence in the record.

str ctions may have been defective. But since this specific objection was not made below, the error would have to reach the standard of plain error. Given the nature of the evidence against Achobe and his co-defendants, which amply demonstrated that *profitable* transactions were supplying the funds then laundered, any error does not reach such a standard.

V. PREJUDICE BY DISTRICT COURT

Relying on participation in the questioning of witnesses in *United States v. Saenz*,[40] Achobe argues that his conviction should be overturned for inappropriate questions asked and comments made by the district court. He cites numerous points in the record, most importantly during his direct testimony, when the district judge interposed comments and questions that, he alleges, prejudiced the impartiality of the tribunal and undermined his ability to defend himself.

Trial judges have considerable latitude over the "tone and tempo" of a trial, and a judge may "elicit further information from a witness if he believes it would benefit the jury."[41] "To rise to the level of constitutional error, the district judge's actions, viewed as a whole, must amount to an intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor."[42]

The appellant relies almost exclusively on *Saenz*. In *Saenz*, a panel of this court reversed a lower court's judgment and remanded the case for a new trial on the grounds that the judge's comments and questions during witness testimony had violated the necessary "strict im-

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[40] 134 F.3d 697 (5th Cir. 1998).

[41] United States v. Sanchez, 325 F.3d 600, 603 (5th Cir. 2003) (*citing* FED. R. EVID. 614(b)).

[42] United States v. Bermea, 30 F.3d 1539, 1569 (5th Cir. 1994).

partiality" of the court. It held that the violation rose to the level of clear error. Achobe has preserved the error and we apply harmless error.

The *Saenz* court explained that its ruling was unusual. It emphasized that its analysis was based on the "totality of the circumstances," offering a review of how the judge's actions had "quantitatively and qualitatively" tainted the necessary appearance of impartiality. In addition to the sheer volume of comments involved, the particular sensitivity of the testimony undermined was a major factor in *Saenz*. As a later panel, in *United States v. Cantu*, characterized *Saenz*:

> In reaching our holding in *Saenz*, we emphasized that such a result obtained only because of the "unusual combination of circumstances" the case presented. Most importantly, the government's case in *Saenz* rested almost entirely on the testimony of a codefendant who was cooperating with the prosecution. As a result, the outcome of the case hinged on whether the jury believed the testimony of the government's witness or that of the defendant, who . . . testified in his own defense. In light of the crucial nature of the testimony of these two witnesses and the scant evidence supporting conviction (other than the cooperating witness' testimony), we held that the district court's substantial questioning of both key witnesses in a manner that could have appeared to convey partiality toward the prosecution required that we reverse the defendant's conviction and remand the case for a new trial.[43]

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[43] United States v. Cantu, 167 F.3d 198, 203 (5th Cir. 1999) (citations omitted).

The panel in *Cantu* distinguished the facts before it from those in *Saenz*, as did the panel in *United States v. Sanchez*.[44]

As Achobe notes, some of Judge Hittner's comments came during Achobe's direct testimony, and this case resembles *Saenz* in that aspect. For instance, during Achobe's direct testimony, when Achobe offered one of the strongest points in his favor by noting that he refused to deal further with Herpin after becoming suspicious of her prescription practices, the court intervened to ask: "Well, let me ask you this: Did you ever try to turn her into the DEA?" Such a comment works against Achobe['s] effort to build his credibility through his direct testimony, and it suggests antagonism or incredulity on the part of the court. As in *Saenz*, Achobe's credibility in claiming not to have known that the Herpin scripts were illegitimate when he filled them is of the utmost importance. A few other comments and questions during Achobe's direct testimony give some pause,[45] as a defendant's direct testimony is of special sensitivity.[46]

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[44] The standard of review in *Sanchez* was plain error. *Sanchez*, 325 F.3d at 608.

[45] At one point in particular, the court took over during Achobe's direct testimony on September 16, 2005. That the trial day was coming to a close is important. The exchange began around 5:30 pm, as Achobe sought to demonstrate his meticulous record-keeping and adherence to pharmaceutical rules. Part of the questioning ran:

> ACHOBE: This is the point: Don't come to me—if your hydrocodone is supposed to last 30 days, don't come to me—
>
> THE COURT: Are you the only one that does all of that, you think, in the whole county? Is that what you're saying?
>
> ACHOBE: I don't know.
>
> THE COURT: Who else? Now, you're in the business. Who else does all this?
>
> ACHOBE: That's my practice. I don't know. I don't know too many pharmacists. I'm sorry, Your Honor.

THE COURT: You don't know too many pharmacists?

ACHOBE: I don't visit too many other pharmacists and getting—very few people that I know.

THE COURT: Well, you are a professor. I mean, you know all—you should know a bunch of pharmacists.

ACHOBE: I know them, but, Your Honor, let me explain this very carefully. I know them; but if I came to your office or came to your pharmacy, I don't go into what you do.

THE COURT: Well, do you go to any continuing legal—any continuing pharmaceutical education or pharmacy education courses?

ACHOBE: Yes, yes.

THE COURT: Any of this ever been discussed?

ACHOBE: I—documented sometime.

THE COURT: No, no, like the—to the extent that you do it?

ACHOBE: It's been discussed, but sometime I go a little bit overboard.

THE COURT: All right. Have you been—have you been asked to be a speaker on what additional—what precautions you say that you do in every case?

ACHOBE: If somebody asked me to do it, I will be glad to share that information. Nobody has ever asked me, Your Honor.

BY MR. GLADDEN [Achobe's attorney]:

Q: Did you suggest to your students that were working under you to generate any sort of a patient medication profile with the kinds of—both questions and statements that you have them acknowledge?

A: Most of my students were not—they're two—we are talking about two different sets of pharmacy practice.

THE COURT: Hold it. Answer the question. Hold it a second.

ACHOBE: Your honor—

THE COURT: Wait a second. Read the question back. We're going to start moving here, okay?

(The last question was read.)

THE COURT: That's a yes or a no.

ACHOBE: Your honor, I don't want you to be mad at me.

THE COURT: I'm not mad at anybody. I'm just trying to move the case along.

On the other hand, this was a large trial and significant amounts of evidence were adduced in favor of the government's argument, unlike in *Saenz*. Nor, in light of this large record, are the comments picked out by Achobe "quantitatively" significant, as in *Saenz*. Achobe offers numerous excerpts from the trial record in support of his claim, and his counsel, having assiduously combed through the record, has presented some instances of intervention by the lower court that, when read in isolation, cast some doubt on the trial. All but a couple of his proffered examples, however, fade into total insignificance when read in context. The trial was complex and lengthy, and as the *Saenz* court recognized: "The need for a trial court to question witnesses to clarify testimony is greatest in a complex or lengthy case . . . ."[47] As a trial day closes, trial counsel can expect a push from the court to conclude. And this timing is not lost on a jury facing a commute home and a return the next day.

ACHOBE: The hospital environment where I—

THE COURT: Okay, wait a second. Hold it.

MR. GLADDEN: I can—

ACHOBE: It's different.

THE COURT: Hold it, both of you-all.

ACHOBE: Okay, sir.

THE COURT: Okay. I'm not jumping the attorney. I'm asking the questions, and he's trying to give me the answers he wants to give. If you cannot answer it yes or no, tell me. You cannot answer it yes or no?

ACHOBE: No, sir.

THE COURT: Okay. He can't answer it yes or no. Fair enough. Mr. Gladden, next question.

Note that the court offered a lengthy curative instruction early the following day, at request of counsel.

[46] *See id.* at 608; *Cantu*, 167 F.3d at 203.

[47] *Saenz*, 134 F.3d at 703.

In the end, upon review of the entire trial record, which stretches to many thousands of pages, we reject Achobe's claim. *Saenz* was a simple trial, lasting not even two full days. Here, the comments arguably of questionable tone fail to dominate the lengthy record. Achobe's direct testimony alone stretched to approximately five hours over two days. Nor do they lead us to conclude that the jury is likely to have doubted the impartiality of Judge Hittner, whose attention to the needs of the jury is evident throughout the record. The court does not appear to have been biased or to have communicated bias, certainly not to a level that would "seriously affect[ ] the fairness, integrity, or public reputation of the judicial proceeding."[48] This impression is re-affirmed by the lower courts' repeated comments to the jury not to construe any of its utterances as supporting the case made by either the prosecution or the defense. Some of the court's interventions were arguably unwise and close to indicating partiality, but given the scope of this trial and their context, they do not merit reversal of the convictions. That said, we will not hesitate to find error when a trial judge forgets that he is no longer at counsel table.

VI. ADOPTION OF ARGUMENTS

Achobe asserts that because the lower court "ruled that all motions or objections by one defendant would be deemed adopted by every other defendant," he can "incorporate[ ] *mutatis mutandis* all arguments made by his co-defendants in their appeals. . . . The government has stipulated that Federal Rule of Appellate Procedure 28(i) applies to this case to the same extent as if Mr. Achobe's appeal had not been severed." The government did not answer this assertion, and we need not reach the issue of which of his co-defendants' arguments Achobe could

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[48] *Sanchez*, 325 F.3d at 609.

adopt, because Achobe's co-defendants presented no compelling arguments on appeal on any issue relevant to Achobe.

VII. EFFECTS OF REVERSAL OF COUNTS 20 AND 25

Any portions of Achobe's sentence of imprisonment or monetary penalties relating to counts 20 and 25 must be and are vacated. We leave any appropriate adjustments in sentence and penalties to the district court.

VIII. CONCLUSION

For the reasons stated above, the judgment below is AFFIRMED as to all counts but 20 and 25, which are REVERSED, and the sentences relating to these counts VACATED. This case is REMANDED for further proceedings consistent with this opinion including any additional sentencing proceedings found necessary by the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. NO. H-04-442
HOUSTON, TEXAS

UNITED STATES OF AMERICA

VS.

OTUKAYODE ADELEKE OTUFALE
ISAAC SIMEON ACHOBE
CHICHA KAZEMBE COMBS
ANDRÉ DION BROWN
JOHN DAVID WILEY, III
ANTHONY DWAYNE ESSETT

APRIL 29, 2005
10:00 A.M. TO 5:50 P.M.

DAY 10
TRANSCRIPT of TRIAL
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE, and a JURY

* * * *

[1974] *THE COURT:* * * * Mr. Gladden?
MR. GLADDEN: May it please the Court. Isaac Achobe would move for judgment of acquittal under Rule 29, insufficient evidence. * * *

* * * *

[1978] *MR. GLADDEN:* * * * The evidence from both Dr. Herpin was that she never entered any conspiracy with my client. In fact, he [1979] was telling her to follow the law and to dot her I's and cross her T's. And when he thought she might be going astray of the law, he told her to take a chill pill or tone it down or quit, or something like that. And she—her testimony was she didn't follow his advice to follow the law and, in fact, went out and broke the law. So, there's no evidence that a reasonable jury could find that he entered into some conspiracy he even knew about or entered into any agreement himself.

* * * *

MR. GLADDEN: And we would ask for a judgment of acquittal as to all of the various counts, the aiding and abetting, that's the distribution, the conspiracy, and the promotion of money laundering counts.

THE COURT: Okay. Thanks.

* * * *

[2002] *THE COURT:* Let's move to Mr. Achobe. It[] says insufficient evidence, multiple prescriptions, the list of names, fictitious comparison, not as large quantities as the other pharmacies, no evidence of transfer of prescriptions, interaction with Dr. Herpin, question mark.

MR. BALBONI: All right.

THE COURT: Go on.

MR. BALBONI: I'll start by saying what I just said and that is, we do not have this type of evidence with respect [2003] to Mr. Achobe.

THE COURT: The conspiracy, where is it?

MR. BALBONI: The conspiracy with Mr. Achobe is, first of all, Dr. Herpin's testimony that they had the initial conversation where he brought up the issue of pain

management, where he gave her the advice as to how she should conduct herself.

THE COURT: Is advice sufficient?

MR. BALBONI: Well, is just the advice? Perhaps not. That's only one piece.

THE COURT: Go on.

MR. BALBONI: She gives—I'm sorry. He gives her the advice to specifically how to do certain things and then he says, "But you really need to go talk to other doctors who are in this business." And he sends her to Mister—or to Dr. Peters. And Mr. Achobe had filled for Dr. Peters, based on the records that are in evidence, for quite—for—

MR. GLADDEN: That's not true.

MR. BALBONI: Well, I don't want to misstate it. Let me see, one second here. Well, by his own admission, he had previously filled for Dr. Peters. I don't know whether the time period we have, we have any actual evidence of that. We may not. But by his own statements to Dr. Herpin and to I believe also to the DEA, he had filled for Dr. Peters in the past. And he sends her to Dr. Peters to learn how to do this [2004] right. And what does Dr. Peters tell her, based on Mr. Achobe sending her to Dr. Peters? But things such as, "Make sure you strip them down so they're not wearing a wire. Make sure you watch the money, so it's not hot."

THE COURT: All right. Again, does that move him into the conspiracy?

MR. BALBONI: We're moving closer. We're moving closer. Because he's now sent her to a co-conspirator. He has sent her to Dr. Peters, who is also—

THE COURT: An unindicted co-conspirator, is that what you're saying?

MR. BALBONI: Unindicted, that's correct, unindicted co-conspirator—

THE COURT: All right. Go on.

MR. BALBONI: —whose prescriptions are filled within this time frame by some of the defendants in this case.

As far as multiple scripts, Mr. Gladden said there is no evidence of multiple scripts being delivered to a single person. There are no—there's no evidence of lists being delivered to just Mr. Achobe and drugs delivered back. But we have at least two instances, two days where the promethazine with codeine that was on the prescriptions for the undercovers who went to Mr. Achobe on the 16th of June, where Mr. Achobe told them, "I don't have promethazine," and sent them away, his own dispensing records indicate that in fact he [2005] dispensed those pints of promethazine in the names of the undercovers, the undercover names. And the testimony of the undercover agent was that they never went back and picked them up, which means Mr. Achobe dispensed those prescriptions to somebody other than the two undercovers, which means he dispensed in at least that one instance promethazine to somebody other than who's—who had the prescription.

Sometime in September, it happens again. Again, the undercover's testimony was we never went back there and actually ever got promethazine. Yet according to Mr. Achobe's own records, I think it was the 3rd or so of September, two more pints of promethazine are dispensed.

THE COURT: Remind me of the evidence, why they didn't go back to pick it up.

MR. BALBONI: They tried to go back and every time they—as a matter of fact, they went the day of the 16th and he said, "I don't have it. Come back." They went back a day or so later. What was it?

MS. CALLAHAN: The 20th.

MR. BALBONI: They went back on the 20th. They—not they. I think just the actual officer who testified went

back, was told, "I still don't have any." And then at that point the investigation went elsewhere and they just never went back to attempt to fill that script any longer at Mr. Achobe's.

Undeterred by that, Mr. Achobe, based on his own [2006] records, filled and refilled those scripts in the names of the undercover officers first and gave the promethazine to whoever, we don't know.

THE COURT: Go on.

MR. BALBONI: As far as the fact that we allege large quantities of hydrocodone and promethazine, there's no question with respect to some of the others in this room, Mr. Achobe is—doesn't have the numbers. But if the Court recalls, and it's right here, by 2003, and I won't pull it up, but by 2003, Mr. Achobe on the second floor of an office building, where if you don't know where he is, you're not going to find him, is ordering more hydrocodone than the Texas average, more hydrocodone than the Texas average in a location where if you don't know where he is—

THE COURT: Well, is that reflected in his records?

MR. BALBONI: Yes, Your Honor, it is reflected in his records.

THE COURT: Go on.

MR. BALBONI: And let's see. The overt acts and all, I mean, an overt act is an overt act. That's been proven, and we won't need to get into that.

THE COURT: Where's the overt act?

MR. BALBONI: Well, Mr. Gladden was talking about there were three scripts. The overt act was that he had filled three scripts for doctor—sorry, three scripts of Dr. Callie [2007] Herpin's for the undercovers.

THE COURT: All right.

* * * *

[2014] *THE COURT:* * * * I think this narrowed the issues pretty well and laid it out. However, motions for acquittals of all defendants are overruled.

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. NO. H-04-442
HOUSTON, TEXAS

UNITED STATES OF AMERICA,

VS.

OTUKAYODE ADELEKE OTUFALE
ISAAC SIMEON ACHOBE
CHICHA KAZEMBE COMBS
ANDRÉ DION BROWN
JOHN DAVID WILEY, III
ANTHONY DWAYNE ESSETT

MAY 10, 2005
10:30 A.M. to 12:55 P.M.

DAY 14
TRANSCRIPT of TRIAL
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE, and a JURY

* * * *

[2667] *THE COURT:* All right. Everybody I'm sure, I'll take for granted, that they renew their judgment—motion for judgment of acquittal.

Anybody else want to be specifically heard? You don't have to be, but if you want to be, now is the time.

MR. GLADDEN: Well, I would join Judge Jefferson for all the reasons he stated. I would also call the Court's attention to the acts that Mr. Achobe was alleged to have performed in furtherance of the conspiracy in the indictment [2668] involved use of lists, which they have now conceded he did never do anything like that, selling, dispensing, I guess, the promethazine that the undercover agents ordered. But the evidence is now clear that while he may have put them in a bag and put them on the shelf, there's no evidence that anyone ever came and picked them up. Remember where everyone signs for them, where the cop signed for them or someone else signs for them? Those prescriptions never left the stor[e]. That's the other part of their—that was the only thing he had suggesting my client did something in furtherance of this conspiracy.

Telling her to follow the law predates any apparent conspiracy. He talked about how when she got together with Dr. Peters, maybe that started it. But her testimony was, he told her to follow the law. Well, then it was when she got together with her staff and started producing prescriptions that were not for a legitimate medical necessity.

But my client talked to her a few times, and the only times he talked to her either predate that or it was at a time when he said you seem to be giving too many refills or you need to—you know, you need to tone it down, something along that line.

Again, there's just no evidence of him joining some conspiracy with anyone. They have—you know, they tried to say, well, maybe Peters is one of those unknown [2669] co-conspirators. They didn't charge named unindicted conspirators like Bill Clinton or someone.

THE COURT: Like who?

MR. GLADDEN: Bill Clinton. Was a named unindicted conspirator of a criminal case during his presidency.

They didn't name Peters. They didn't name anybody. They just said known and unknown. I take that to mean they named the ones that they knew. So, there's just no evidence of my guy joining anybody's conspiracy.

And the bootstrapping that they've tried to do with the two police officers that went in there and ordered—or gave them prescriptions, the tape you heard for yourself. He filled one of the prescriptions. He didn't have the other one in stock. When they came back to try to get the other one filled and refill the hydrocodone, he said, no, I'm not going to do that. You've got a week to go. No, you've got two weeks to go.

THE COURT: All right. Let's get right to the bottom line.

MR. GLADDEN: So, at any rate, that's—at our original motion, Mr. Balboni, you questioned him about what's the act? What did he do? And he said, well, how about the cough syrup that he apparently gave to someone that the police had given a prescription for. But there's absolutely no evidence of that in the record of this trial, in the [2670] documentary evidence or otherwise. So, I think unless he's got something else that I somehow have overlooked, he doesn't have any act in furtherance of the conspiracy and he doesn't have any agreement as to my client.

THE COURT: What about that client?

MR. BALBONI: As to Mr. Achobe, Your Honor, the one thing—the only thing I can agree with Mr. Gladden is we don't have any direct evidence of him filling from a list. That having been said, we, of course, have the same pattern evidence with respect to filling Dr. Herpin's scripts. We also have—Mr. Gladden can characterize it the way he wishes, but, of course, at this stage it's in the light

most favorable to the government, not in the light most favorable to Mr. Gladden's client, and the testimony of Dr. Herpin was that she went to Mr. Achobe and Mr. Achobe is the one—

THE COURT: All right. * * *

* * * *

[2675] *THE COURT:* Anyone else? Motions are all overruled.

* * * *

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-20229

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ISAAC SIMEON ACHOBE

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

February 10, 2009

Before KING, HIGGINBOTHAM, and WIENER, Circuit Judges.

PER CURIAM:

Achobe's petition for rehearing is before this panel. Achobe claims that in its opinion in his case, this court misapplied the standard of harmless error, violating the Supreme Court's instructions in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and in subsequent case law.

Achobe's assertions are without merit. The penultimate paragraph of the section at issue makes the point

that the harmlessness of error was considered in light of the "amount of evidence produced by the prosecution" and the fact that "the connection between Achobe and Herpin [was] sufficiently compelling."[1] Although, in the interest of clarity, we might better have separated out references to the implausibility of racial bias as a motivating factor for Achobe's arrest and prosecution, which goes to the merits of the Confrontation Clause claim, we now make clear that even if we were to treat the testimony of the DEA agents as incredible under the harmless-error doctrine elaborated in Van Arsdall,[2] there is substantial evidence of Achobe's guilt. Indeed, much of the agents' testimony is cumulative of damaging, corroborating evidence, with full cross-examination otherwise allowed.

Our refusal to reach the preservation issue, about which there are serious questions on the basis of the record, and the incompleteness of the showing if this complaint was in fact presented to the district court as a se-

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[1] The case against Achobe was established by copious documentary and testimonial evidence, much of it unchallenged (e.g., the testimony of Dr. Herpin; expert witnesses; and two drug dealers, who, although their testimony may offer some support for Achobe's contentions, provided evidence that Achobe knew something was amiss, but believed clever adherence to formalities could save him). Each bit alone may not be sufficient, but, taken together, we are convinced that the errors asserted are harmless beyond a reasonable doubt in light of the other evidence establishing Achobe's guilt.

[2] Van Arsdall instructs us to consider the "importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." 475 U.S. at 684. That is precisely what we did in our opinion and repeat for emphasis in note 1, supra.

lective-prosecution claim, remains justified in light of the harmlessness of the error.

Achobe's petition for rehearing is DENIED.